

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

GARY GENE WATTS,) 3:04-CV-0386-ECR (RAM)
Petitioner,)
vs.) Order
CRAIG FARWELL, et al.,)
Respondents.)

I. Introduction and Background

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, by Gary Gene Watts, a prisoner at Lovelock Correctional Center.

Petitioner was convicted in Nevada's Third Judicial District Court in 1998 of three counts of sexual assault of a minor under the age of fourteen years, and was sentenced to three consecutive terms of life imprisonment with the possibility of parole after ten years. Petitioner pled guilty to two of the charges and entered an Alford plea as to the third count.

Petitioner filed a pro se appeal, for which Attorney John P. Springgate entered an appearance to represent Petitioner in the prosecution of his appeal. Petitioner sought to challenge his plea canvass, alleging that the sentences were to run concurrently, not consecutively. The Nevada Supreme Court dismissed the appeal on May 10, 2000, because the Court does not allow a defendant to challenge

1 the validity of a guilty plea on direct appeal. Order Dismissing
2 Appeal, No. 32978 at 1-2 (May 10, 2000) (Ex. 36).

3 On May 9, 2001, Petitioner filed a post-conviction Petition for
4 Writ of Habeas Corpus, raising five assignments of error:

5 (1) Petitioner's guilty/Alford plea was not knowingly,
6 voluntarily or intelligently entered because the court failed
7 to discuss or explain to Petitioner the possibility and effect
8 of consecutive sentences during the plea canvass;

9 (2) Ineffective assistance of trial counsel, Attorney Witek,
10 because counsel failed to have a psychological evaluation
11 performed regarding Petitioner's competency and failed to
12 adequately advise Petitioner regarding the consequences of his
13 plea;

14 (3) Ineffective assistance of trial counsel, Attorney Witek,
15 because counsel failed to advise Petitioner and Court of a
16 conflict of interest: Witek also represented one of the three
17 female victims on other charges during his representation of
18 Petitioner;

19 (4) Ineffective assistance of trial counsel, Attorneys Witek,
20 Ward, and Grant, for failure to investigate the case; and

21 (5) Ineffective assistance of appellate counsel for raising
22 only the sentencing claim, and neglecting the conflict of
23 interest claim, on direct appeal.

24 On December 21, 2001, Petitioner's attorney filed a Brief in
25 Support of Petition for Writ of Habeas Corpus, providing additional
26 argument concerning (1) the failure to investigate the criminal
27 charges, (2) whether Defendant's plea was not knowing and
28 intelligent due to counsel's failure to investigate, (3) counsel's
conflict of interest, and (4) whether based on the totality of the
circumstances, Petitioner's guilty plea should be set aside because
the plea was not knowingly and voluntarily made. On January 10,
2003, Petitioner's attorney filed a Supplemental Petition for Post-
Conviction Relief to discuss trial counsel's purported conflict of
interest due to his employment at the Lyon County District

1 Attorney's office at the commencement of Petitioner's criminal
2 charges, to which the State responded.

3 After an evidentiary hearing, the state district court denied
4 the petition. Petitioner appealed this decision. The Nevada
5 Supreme Court "received/entered" Petitioner's proper person
6 Appellant's Opening Brief on October 16, 2003, which raised the
7 following assignments of error:

8 I. The District Court erred by determining that Counsel Witek's
9 representation was effective under Strickland

10 A. Witek's failure to investigate was ineffective and
Appellant was prejudiced thereby

11 B. Counsel's two conflicts of interest was ineffective and
12 Appellant was prejudiced thereby

13 II. The District Court erred by determining that Appellant's
guilty plea was voluntarily and knowingly entered

14 III. The District Court failed to render findings of fact and
15 conclusions of law as to several claims presented in the
proceedings below which merit habeas relief

16 A. A Brady violation occurred

17 B. Appellate counsel was ineffective

18 C. Appellant's question of competency was never addressed

19 Petitioner was allowed to file a supplemental memorandum
20 addressing counsel's two purported conflicts of interest. The
21 Nevada Supreme Court affirmed the district court.

22 Petitioner filed his Petition for Writ of Habeas Corpus (#7) in
23 this Court on September 21, 2004. The present petition,
24 Petitioner's First Amended Petition (#17), was filed on May 6, 2005.
25 The First Amended Petition raises the following grounds for relief:

26 Ground One: Violation of due process of law under the Fifth and
27 Fourteenth Amendments to the United States Constitution because
his guilty plea was not entered knowingly, intelligently, and

28

1 voluntarily due to the trial court's failure to advise
2 Petitioner of the possibility of consecutive sentences.

3 Ground Two: Ineffective assistance of trial counsel as
4 guaranteed by the Sixth and Fourteenth Amendments to the United
5 States Constitution as a result of counsel's failure to (A)
6 investigate the case, (B) advise Petitioner as to the
7 consequences of his plea, (C) obtain a psychological
8 examination, and (D) advise Petitioner or the Court of the
9 conflicts of interest.

10 Respondents answered (#27) and moved to dismiss the petition
11 (#28). This Court found that Ground 2(B) - failure to advise
12 Petitioner as to the consequence of his plea - was not exhausted.
13 (Order #37.) Pursuant to this Court's Order (#37), Defendant
14 elected to abandon Ground 2(B). The remaining issues are properly
15 before the Court.

16 II. Federal Habeas Standard

17 Title 28 of United States Code § 2254(d), a provision of the
18 Antiterrorism and Effective Death Penalty Act (AEDPA), provides the
19 legal standards for this Court's consideration of the petition in
20 this case:

21 An application for a writ of habeas corpus on behalf
22 of a person in custody pursuant to the judgment of a State
23 court shall not be granted with respect to any claim that
24 was adjudicated on the merits in State court proceedings
25 unless the adjudication of the claim --

26 (1) resulted in a decision that was contrary to, or
27 involved an unreasonable application of, clearly
28 established Federal law, as determined by the Supreme
Court of the United States; or

(2) resulted in a decision that was based on an
unreasonable determination of the facts in light of the
evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

1 These standards of review "reflect the ... general requirement
2 that federal courts not disturb state court determinations unless
3 the state court has failed to follow the law as explicated by the
4 Supreme Court." Davis v. Kramer, 167 F.3d 494, 500 (9th Cir. 1999).

5 A state court decision is contrary to clearly established
6 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if
7 the state court applies a rule that contradicts the governing law
8 set forth in [the Supreme Court's] cases" or "if the state court
9 confronts a set of facts that are materially indistinguishable from
10 a decision of [the Supreme Court] and nevertheless arrives at a
11 result different from [the Supreme Court's] precedent." Lockyer v.
12 Andrade, 123 S.Ct. 1166, 1173 (2003) (quoting Williams v. Taylor,
13 529 U.S. 362, 405-06 (2000), and citing Bell v. Cone, 535 U.S. 685,
14 694 (2002)).

15 A state court decision is an unreasonable application of
16 clearly established Supreme Court precedent, within the meaning of
17 28 U.S.C. § 2254(d), "if the state court identifies the correct
18 governing legal principle from [the Supreme Court's] decisions but
19 unreasonably applies that principle to the facts of the prisoner's
20 case." Lockyer v. Andrade, 123 S.Ct. at 1174 (quoting Williams, 529
21 U.S. at 413). The "unreasonable application" clause requires the
22 state court decision to be more than incorrect or erroneous; the
23 state court's application of clearly established law must be
24 objectively unreasonable. Id. (quoting Williams, 529 U.S. at 409).

25 In determining whether a state court decision is contrary to
26 federal law, this Court looks to the state courts' last reasoned
27 decision. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991);

1 Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000),
2 cert. denied, 122 S.Ct. 324 (2001).

3 With respect to pure questions of fact, "a determination of a
4 factual issue made by a State court shall be presumed to be
5 correct," and the petitioner "shall have the burden of rebutting the
6 presumption of correctness by clear and convincing evidence." 28
7 U.S.C. § 2254(e)(1).

8

9 **III. Consideration of Exhibit 57**

10 In its Order (#37), this Court reserved judgment on the
11 question of whether Exhibit 57, an affidavit meant to support the
12 amended petition, should be considered in ruling on Petitioner's
13 federal habeas claims. (Order 2:21-22 (#37).) Exhibit 57 is an
14 affidavit from Ed Heddy, an investigator with the Federal Public
15 Defenders Office. Heddy claims to have spoken to two of the victims
16 and that they acknowledge they were "active participants" in the
17 charged sexual acts. (Ex. 57 at 2.) Attached to the affidavit are
18 two statements, purportedly belonging to the two victims, where both
19 victims state they would have testified that Petitioner should have
20 received a lighter sentence. Petitioner suggests that in light of
21 this, he should have been sentenced to a sentence concomitant with
22 statutory seduction, one to ten years, instead of sexual assault,
23 which at the time of the crime carried a life sentence with a
24 possibility of parole after ten years. Petitioner was 42 at the
25 time of the sexual assaults; the victims were 13.

26 Respondent argues that considering the attachment of new
27 evidence violates 28 U.S.C. § 2254 because the Court would be

28

1 examining a different record than that which was before the state
2 courts. Petitioner responds that the affidavit "merely provides
3 evidence that the facts as alleged by Watts were, in fact, true."
4 (Petit.'s Opp. 9 (#32).) Petitioner seeks to use the evidence to
5 support his claim that trial "counsel was ineffective for failing to
6 investigate, locate and interview the victims." (Id.)

7 We do not find Petitioner's reasoning persuasive. Petitioner
8 is attempting to inject the affidavit into the proceedings
9 specifically to continue to develop the factual record. Section
10 2254(e)(2) permits this additional information in only limited
11 instances, none of which are present here. There is no "new rule of
12 constitutional law made retroactive to cases on collateral review by
13 the Supreme Court" that was previously unavailable. See §
14 2254(e)(2)(A)(i). Nor is there "a factual predicate that could not
15 have been previously discovered through the exercise of due
16 diligence." See § 2254(e)(2)(A)(ii). Finally, there is nothing
17 underlying the claim that "would be sufficient to establish by clear
18 and convincing evidence that but for constitutional error, no
19 reasonable fact-finder would have found the applicant guilty of the
20 underlying offense." See § 2254(e)(2)(B).

21 Therefore, we will not consider Exhibit 57.
22

23 **IV. Ground One: Consecutive and Concurrent Sentences Claim**

24 Petitioner avers that his conviction and sentence are
25 unconstitutional because his guilty plea was not knowingly,
26 intelligently, and voluntarily given in violation of his Fifth and
27 Fourteenth Amendment rights because the trial court failed to advise
28

1 him that the sentences could run consecutively. Specifically,
2 Petitioner argues that the "trial court did not specifically advise
3 him that the sentences could run consecutively or that it was solely
4 within the court's discretion to impose the sentences consecutively
5 or concurrently." (Petit.'s Reply 5 (#42).)

6 Respondents argue that "the record reflects that Watts was in
7 fact aware that the sentences could be imposed consecutively."
8 (Resps.' Answer 10 (#40).)

9 **A. Standard for Withdrawal of Plea Deal**

10 A guilty plea waives important rights and is valid only if done
11 voluntarily, knowingly, and intelligently, "with sufficient
12 awareness of the relevant circumstances and likely consequences."
13 Brady v. United States, 397 U.S. 742, 748 (1970). The court taking
14 a defendant's plea is "responsible for ensuring a 'record adequate
15 for any review that may be later sought.'" Bradshaw v. Stumpf, 545
16 U.S. 175, 183 (2005) (quoting Boykin v. Alabama, 395 U.S. 238, 244
17 (1969)). The Supreme Court has "never held that the judge must
18 himself explain the elements of each charge to the defendant on the
19 record." Id. Instead, the "constitutional prerequisites of a valid
20 plea may be satisfied where the record accurately reflects that the
21 nature of the charge and the elements of the crime were explained to
22 the defendant by his own, competent counsel." Id. Nevertheless, a
23 plea of guilty must include the awareness of the "direct
24 consequences" of the plea. Brady, 397 U.S. at 755 (quoting Shelton
25 v. United States, 242 F.2d 101, 115 (5th Cir. 1957) (judgment rev'd
26 on other grounds by Shelton v. United States, 356 U.S. 26 (1958))).

27 //

28

B. Analysis

Petitioner contends that the Nevada Supreme Court did not rely on any Supreme Court of the United States precedent in making its decision. Even though this is true, such a failure does not require the writ to issue. In considering this claim, the Nevada Supreme Court found that "the guilty plea agreement, signed by Watts, provided that 'if more than one sentence of imprisonment is imposed the sentencing judge has the discretion to order the sentences served concurrently or consecutively.'" Order of Affirmance, No. 41762 at 2-3 (May 28, 2004). The Court continued, "during the oral plea canvass, Watts acknowledged that he signed and discussed the terms of the plea agreement with his attorney." Id. at 3. The Court noted that the district court did not explicitly advise Petitioner that his sentences could be imposed consecutively during the canvass, but concluded that "the failure to utter talismanic phrases will not invalidate a plea where a totality of circumstances demonstrates that the plea was freely, knowingly, and voluntarily made." Id. (quoting State v. Freese, 13 P.3d 442, 447 (Nev. 2000)).

The trial court below sufficiently ensured an adequate record for review, and this record reveals that Petitioner knew that his sentences could be imposed either consecutively or concurrently. Thus, the constitutional prerequisites for entering into a plea deal were met in accordance with the Supreme Court in Bradshaw. First, as the Nevada Supreme Court found, Petitioner himself signed the guilty plea agreement, which provided for the possibility that the sentencing judge could impose consecutive sentences. Second, as the

1 Nevada Supreme Court found, Petitioner acknowledged that he
2 discussed the terms of the plea agreement with his attorney. Third,
3 the guilty plea agreement provided that the district attorney could
4 argue for the imposition of consecutive sentences. Guilty Plea
5 Agreement at 1 (Exhibit 19). Fourth, Petitioner acknowledged that
6 he understood the consequences of his plea in the guilty plea
7 agreement. Id. at 2 ("Consequences of the Plea" section). Fifth,
8 Petitioner did not object when the prosecutor asked for consecutive
9 sentences, (Sentencing Proceedings, July 20, 1998 at 7-14 (Exhibit
10 23)), nor did Petitioner object when his own attorney asked the
11 court to run one of the three counts concurrently rather than
12 consecutively, thereby arguing for a twenty-year term instead of a
13 thirty-year term. (Id. at 10.) Sixth, Petitioner did not object or
14 make any indication that he did not understand what was happening
15 when the court imposed consecutive sentences. (Id. at 12-14.)

16 We cannot say that the Nevada Supreme Court's conclusion, in
17 light of the precedent of the Supreme Court of the United States,
18 was objectively unreasonable.

19 20 **V. Ground Two: Ineffective Assistance of Counsel**

21 Petitioner claims he received ineffective assistance of counsel
22 in three ways: (1) counsel failed to investigate the case; (2)
23 counsel failed to seek a competency evaluation; and (3) counsel had
24 two conflicts of interest.

25 **A. Standard for Ineffective Assistance of Counsel**

26 In McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970), the
27 Supreme Court declared that "the right to counsel is the right to
28

1 the effective assistance of counsel." In Strickland v. Washington,
2 466 U.S. 668 (1984), the Court established the standards by which
3 claims of ineffective counsel are to be measured. In Strickland,
4 the Court propounded a two prong test; a petitioner claiming
5 ineffective assistance of counsel must demonstrate (1) that the
6 defense attorney's representation "fell below an objective standard
7 of reasonableness," and (2) that the attorney's deficient
8 performance prejudiced the defendant such that "there is a
9 reasonable probability that, but for counsel's unprofessional
10 errors, the result of the proceeding would have been different."
11 Strickland, 466 U.S. at 688, 694.

12 Regarding the first prong – commonly known as the
13 "effectiveness prong" – the Strickland Court expressly declined to
14 articulate specific guidelines for attorney performance beyond
15 generalized duties, including the duty of loyalty, the duty to avoid
16 conflicts of interest, the duty to advocate the defendant's cause,
17 and the duty to communicate with the client over the course of the
18 prosecution. Id. Defense counsel's duties are not to be defined so
19 exhaustively as to give rise to a "checklist for judicial evaluation
20 ... [because] [a]ny such set of rules would interfere with the
21 constitutionally protected independence of counsel and restrict the
22 wide latitude counsel must have in making tactical decisions." Id.

23 The Strickland Court instructed that review of an attorney's
24 performance must be "highly deferential," and must adopt counsel's
25 perspective at the time of the challenged conduct, in order to avoid
26 the "distorting effects of hindsight." Id. at 689. A reviewing
27 court must "indulge a strong presumption that counsel's conduct
28

1 falls within the wide range of reasonable professional assistance
2 ... [and] the [petitioner] must overcome the presumption that ...
3 the challenged action might be considered sound trial strategy.”
4 Id. (citation omitted).

5 Construing the Sixth Amendment to guarantee not effective
6 counsel per se, but rather a fair proceeding with a reliable
7 outcome, the Strickland Court concluded that demonstrating that
8 counsel fell below an objective standard of reasonableness alone is
9 insufficient to warrant a finding of ineffective assistance. In
10 order to satisfy Strickland’s second prong, the defendant must show
11 that the attorney’s sub-par performance prejudiced the defense. Id.
12 at 691-92. The test is whether there is a reasonable probability
13 that, but for the attorney’s challenged conduct, the result of the
14 proceeding in question would have been different. Id. at 691-94.
15 The Court defined reasonable probability as “a probability
16 sufficient to undermine confidence in the outcome.” Id. at 694.

17 **B. Ground Two A: Failure to Investigate the Case**

18 Petitioner contends that trial counsel failed to conduct any
19 interviews or perform any investigation of the underlying case.
20 Petitioner argues that his decision to plead guilty was predicated
21 on a Sixth Amendment violation – to wit, that trial counsel
22 “abdicated his Sixth Amendment responsibility to zealously represent
23 his client.” (Petit.’s Reply 7 (#42).) Petitioner contends that
24 had trial counsel investigated the case, counsel would have been
25 able to develop the fact that the sexual acts were consensual.
26 Petitioner asserts that the prosecution could then only have proven
27
28

1 statutory sexual seduction, the penalties for which are
2 significantly lower than those for sexual assault.

3 The Nevada Supreme Court rejected Petitioner's claims. The
4 Court wrote:¹

5 To state a claim of ineffective assistance of trial
6 counsel sufficient to invalidate a judgment of conviction,
7 a petitioner must demonstrate that counsel's performance
8 fell below an objective standard of reasonableness. See
9 Strickland v. Washington, 466 U.S. 668, (1984); Warden v.
10 Lyons, 100 Nev. 430, 683 P.2d 504 (1984). A petitioner
11 must further establish "a reasonable probability that, but
12 for counsel's errors, he would not have pleaded guilty and
13 would have insisted on going to trial." Hill v. Lockhart,
474 U.S. 52, 59 (1985); see also Kirksey v. State, 112
Nev. 980, 988, 923 P.2d 1102, 1107 (1996). The court can
dispose of a claim if the petitioner makes an insufficient
showing on either prong. Strickland, 466 U.S. at 697.
The district court's factual findings regarding a claim of
ineffective assistance of counsel are entitled to
deference when reviewed on appeal. Riley v. State, 110
Nev. 638, 647, 878 P.2d 272, 278 (1994).

14 . . .
15 Third, Watts alleged that his trial counsel was
16 ineffective for failing to investigate the victims. Watts
17 claimed that with a proper investigation, he would not
18 have pleaded guilty. Watts contended that a thorough
19 investigation would have produced impeachment evidence,
20 allowed counsel to attack the credibility of the victims,
21 revealed the victim's motive to fabricate, and uncovered
22 whether the victims were competent to stand trial. Watts
23 did not support this claim with specific facts, however,
24 and his claim is nothing more than speculation concerning
25 evidence that may have been uncovered by additional
investigation. See Hargrove v. State, 100 Nev. 498, 502,
686 P.2d 222, 225 (1984). Thus, Watts did not demonstrate
that his trial counsel was ineffective on this issue, and
we affirm the order of the district court with respect to
this claim. Fourth, Watts claimed that his trial counsel
was ineffective for failing to adequately investigate and
inform Watts of the defense of consent. Watts contended
that he would not have pleaded guilty to three counts of
sexual assault on a minor under the age of fourteen if he
was aware that consent was a defense. Watts further
claimed that his counsel was ineffective in allowing him

26 ¹The Nevada Supreme Court places citations in footnotes. For
27 ease of formatting, the citations are embedded in the textual
28 sentences throughout this Order.

1 to plead guilty to sexual assault rather than statutory
2 sexual seduction.

3 Witek testified at the evidentiary hearing that he
4 did not believe consent was a viable defense based on the
5 facts of Watts' case. Witek further testified that the
6 State was unwilling to accept a plea to statutory sexual
7 seduction rather than sexual assault. The record on
8 appeal reveals that forty-two-year-old Watts allowed two
9 runaway thirteen year-old girls to stay at his home.
10 Additionally, a thirteen year-old neighbor frequently
11 spent the night at Watts' residence. Watts provided the
12 girls with marijuana and methamphetamine. He also showed
13 them a pornographic video. When the girls were under the
14 influence of drugs, Watts engaged in sexual activity with
15 them. We conclude that Watts failed to establish that his
16 trial counsel acted unreasonably on this issue. Watts did
17 not demonstrate that the victims were mentally and
18 physically capable of consenting to sexual activity with
19 him, such that his trial counsel was ineffective in
20 allowing him to plead guilty to sexual assault. See NRS
21 200.366 (providing that a person is guilty of sexual
22 assault if he "subjects another person to sexual
23 penetration . . . against the will of the victim or under
24 conditions in which the perpetrator knows or should know
25 that the victim is mentally or physically incapable of
26 resisting or understanding the nature of his conduct").
27 Consequently, the district court did not err in denying
28 the claim.

Order of Affirmance, No. 41762 at 3-7 (May 28, 2004).

16 We find that the Nevada Supreme Court's decision was a
17 reasonable application of clearly established United States Supreme
18 Court precedent. The Nevada Supreme Court identified the correct
19 governing legal principles from the Supreme Court of the United
20 States and reasonably applied those principles to the facts at hand.

21 **C. Ground Two B: Failure to Advise Petitioner as to the**
22 **Consequences of His Plea**

23 Petitioner has voluntarily abandoned this claim. (Petit.'s
24 Formal Decl. of Abandonment (#38).)

25 **D. Ground Two C: Failure To Obtain a Psychological Examination**

26 While awaiting extradition from Guam, Petitioner attempted
27 suicide. He avers that his suicidal ideation remained through
28

1 entering his plea agreement. (Petit.'s Reply 7 (#42).) Trial
2 counsel advised Petitioner that he could undergo a psychological
3 evaluation; however, none was ever taken. (Id.) Petitioner now
4 contends that trial counsel was ineffective because by not insisting
5 on an evaluation, counsel could not be sure that Petitioner was
6 entering a knowing, voluntary, and intelligent plea. (Id.)

7 **1. Supreme Court of the United States Standard**

8 To stand trial, the Supreme Court requires a defendant to have
9 "sufficient present ability to consult with his lawyer with a
10 reasonable degree of rational understanding – and [have] a rational
11 as well as factual understanding of the proceedings against him."
12 Drope v. Missouri, 420 U.S. 162, 172 (1975) (internal quotation
13 omitted). In Godinez v. Moran, 509 U.S. 389 (1993), the Court
14 determined that the standard for competence when pleading guilty was
15 the same as the standard for standing trial. Id. at 398. In Drope,
16 the Supreme Court looked to state law to determine the standard for
17 when a person was competent to stand trial. See Drope, 420 U.S. at
18 173-74.

19 **2. Nevada Supreme Court's Findings**

20 In Petitioner's case, the Nevada Supreme Court found the
21 following:

22 A defendant is competent to stand trial if he has
23 adequate "present ability to consult with his lawyer with
24 a reasonable degree of rational understanding" and if "he
25 has a rational as well as a factual understanding of the
26 proceedings against him." Melchor-Gloria v. State, 99
27 Nev. 174, 179-80, 660 P.2d 109, 113 (1983). A hearing is
28 constitutionally and statutorily required if reasonable
doubt exists as to the defendant's competency. See id. at
180, 660 P.2d at 113; NRS 178.400-440. In the instant
case, Watts did not allege specific facts to support a
conclusion he was unable to consult with his attorney, or

1 understand the proceedings against him. Rather, Watts
2 claimed that he was despondent when faced with extradition
3 to stand trial on multiple sexual assault charges.
4 Further, Witek testified at the evidentiary hearing that
5 he met with Watts three or four times prior to the entry
6 of his guilty plea, and Witek felt that Watts "was not
7 even approaching incompetency." Finally, Watts testified
8 that he never informed Witek of his suicide attempt in
9 Guam. Consequently, we conclude that Watts did not
10 demonstrate that his counsel acted unreasonably in failing
11 to have his competency evaluated, and the district court
12 did not err in denying the claim.

13 Order of Affirmance, No. 41762 at 4-5 (May 28, 2004).

14 **3. Analysis**

15 Here, Petitioner claims that trial counsel was ineffective
16 because he did not order Petitioner to undergo a psychological
17 evaluation to ensure that he was competent to enter into a plea
18 deal. Thus, Petitioner must show that trial counsel was (1)
19 objectively unreasonable and (2) prejudicial to Petitioner in regard
20 to whether Petitioner was sufficiently able to consult with trial
21 counsel.

22 No Supreme Court case requires an attorney to request a
23 psychological evaluation of a client who has attempted suicide.
24 Moreover, as the Nevada Supreme Court found, Petitioner never
25 informed counsel that he had attempted suicide, nor is there any
26 evidence that suggests that counsel should have known of any
27 suicidal ideation. For Petitioner's claim to succeed, not only
28 would trial counsel have had to be aware of the suicide attempt and
somehow forced Petitioner to undergo the evaluation, but Petitioner
would have had to have been found incompetent, otherwise there would
be no prejudice.

1 We find that the Nevada Supreme Court reasonably applied the
2 correct legal standard to the facts in this case.

3 **E. Ground Two D: Failure to Advise Petitioner or the Court of**
4 **the Conflicts of Interest**

5 Petitioner asserts that trial counsel had two conflicts of
6 interest: (1) a conflict due to his representation of one of the
7 victims during the pendency of Petitioner's criminal action; and (2)
8 a conflict due to his employment at the Lyons County District
9 Attorneys office at the initiation of criminal charges against
10 Petitioner.

11 **1. Supreme Court of the United States Standard for**
12 **Conflicts of Interest**

13 In Mickens v. Taylor, 535 U.S. 162 (2002), the Supreme Court of
14 the United States concluded that it is a violation of a defendant's
15 Sixth Amendment right to effective assistance of counsel to actively
16 represent conflicting interests. Id. at 166. For example, the
17 Court in Holloway v. Arkansas, 435 U.S. 475 (1978), found such
18 active representation of conflicting interests occurred when a trial
19 court, over objection, required defense counsel to represent
20 simultaneously three co-defendants. Id. at 478-80. The trial court
21 would not allow counsel to cross-examine any of the defendants on
22 the behalf of the other two. Id. On appeal, the Supreme Court
23 acknowledged that a defense attorney is in the best position "to
24 determine when a conflict of interest exists or will probably
25 develop in the course of a trial." Id. at 485 (internal quotation
omitted).

26 The Supreme Court clarified this position in Cuyler v.
27 Sullivan, 446 U.S. 335 (1980), where the court held that a defendant

1 must demonstrate that a "conflict of interest actually affected the
2 adequacy of his representation." Id. at 348-49. Sullivan also
3 recognized that a trial court may have a duty to inquire into a
4 conflict of interest. Id. at 346-47.

5 Returning to Mickens, the Supreme Court held that unless
6 counsel protests his "inability simultaneously to represent multiple
7 defendants" or the court is required to inquire into a conflict, a
8 petitioner must establish "that the conflict of interest adversely
9 affected his counsel's performance." Mickens, 535 U.S. at 173-74.
10 Thus, the standard to apply is that from Sullivan.

11 **2. Petitioner's Actual Conflict Claim**

12 With respect to Petitioner's claim that counsel was ineffective
13 because counsel previously represented one of the victims, the
14 Nevada Supreme Court found the following:

15 Witek testified that he was asked to represent C.H., one
16 of Watts' victims, in an unrelated juvenile hearing
17 approximately two weeks before he was assigned to
18 represent Watts. Witek stated that he met with C.H. for
19 no more than ten or twelve minutes and appeared briefly
20 with her in juvenile court. Witek further testified that
21 he made no connection between his representation of C.H.
22 and Watts' case until the instant petition was filed. We
23 conclude that Watts failed to establish that an actual
24 conflict of interest existed due to his trial counsel's
25 prior representation of C.H., such that Watts was denied
26 the effective assistance of counsel. Therefore, the
27 district court did not err in denying the claim.

28 Order of Affirmance, No. 41762 at 8-9 (May 28, 2004).

29 The Nevada Supreme Court examined the proper standard and
30 reasonably applied the facts. Counsel was unaware of any potential
31 conflict of interest, and Petitioner has not shown that any conflict
32 actually affected the adequacy of the representation. We also note
33 that in his failure to investigate claim above, Petitioner assigned

1 error to trial counsel for not meeting with C.H.; Petitioner cannot
2 now attempt to argue that by meeting a victim trial counsel's
3 representation was "influenced" and caused him to "advise Watts to
4 enter a plea."

5 **3. Petitioner's Conflict of Interest – Former Employer**
6 **Claim**

7 Petitioner claims that attorney Witek had a conflict of
8 interest in representing Petitioner because Witek previously worked
9 for the Lyons County District Attorney's office. Petitioner avers
10 that Witek did not tell him of Witek's previous employment, and that
11 if Petitioner had known of it, Petitioner would not have allowed
12 Witek to remain as his counsel.

13 With respect to this claim, the Nevada Supreme Court concluded
14 as follows:

15 "The Sixth Amendment guarantees a criminal defendant
16 the right to conflict-free representation." Coleman v.
17 State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); see also
18 Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992). In
19 order to establish a violation of this right, a defendant
20 must demonstrate that "an actual conflict of interest
21 adversely affected his lawyer's performance." Cuyler v.
22 Sullivan, 446 U.S. 335, 350 (1980); see also Clark, 108
23 Nev. 324, 831 P.2d 1374. The existence of an actual
24 conflict of interest must be established on the specific
25 facts of each case, but "[i]n general, a conflict exists
26 when an attorney is placed in a situation conducive to
27 divided loyalties." Clark, 108 Nev. at 326, 831 P.2d at
28 1376 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th
Cir. 1991)).

29 In the instant case, Witek testified he was not
30 involved in Watts' case while he worked at the district
31 attorney's office. Witek further stated that his
32 familiarity with Watts' case consisted of nothing more
33 than a general knowledge that an individual charged with
34 sex offenses had fled the jurisdiction. Witek did not
35 recognize Watts as this individual, however, when Watts
36 was extradited to Nevada more than two years later and
37 Witek was assigned to represent him. Based on the above
38 testimony, the district court's determination that Witek
39 did not actively represent conflicting interests is

1 supported by substantial evidence. See Riley, 110 Nev. at
2 647, 878 P.2d at 278. Consequently, we affirm the order
of the district court with respect to this claim.

3 Order of Affirmance, No. 41762 at 7-8 (May 28, 2004).

4 The Nevada Supreme Court reasonably applied the facts at hand
5 to the appropriate legal standard, as set forth by the Supreme Court
6 of the United States.

7
8 **VI. Conclusion**

9 **IT IS THEREFORE HEREBY ORDERED THAT** Petitioner's request for
10 the Court to include Exhibit 57 in the record is **DENIED**.

11 **IT IS FURTHER ORDERED THAT** the first amended petition for writ
12 of habeas corpus (#17) is **DENIED**.

13 The clerk shall enter judgment accordingly.

14
15 DATED: March 27, 2008.

16 
17 UNITED STATES DISTRICT JUDGE